

## Message

**From:** Donaldson, Guy [Donaldson.Guy@epa.gov]  
**Sent:** 6/18/2019 12:38:47 PM  
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**Subject:** FW: Inside EPA: EPA Approval Of State SSM Waivers Seen As Bid To Evade D.C. Circuit Bar

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**From:** Casso, Ruben  
**Sent:** Tuesday, June 18, 2019 6:44 AM  
**To:** Donaldson, Guy <Donaldson.Guy@epa.gov>; Feldman, Michael <Feldman.Michael@epa.gov>; Robinson, Jeffrey <Robinson.Jeffrey@epa.gov>  
**Subject:** Inside EPA: EPA Approval Of State SSM Waivers Seen As Bid To Evade D.C. Circuit Bar

## EPA Approval Of State SSM Waivers Seen As Bid To Evade D.C. Circuit Bar

June 17, 2019

Environmentalists say EPA's issuance of state-specific waivers for industry emissions spikes during startup, shutdown and malfunction (SSM) events in lieu of issuing a final national rule approving such waivers appears to be a bid to evade a U.S. Court of Appeals for the District of Columbia Circuit case that could block such a policy.

EPA's critics say the agency is approving state SSM waivers that would be litigated in the regional circuit court covering the state, rather than in the D.C. Circuit that hears challenges to EPA rules with national applicability. They claim this strategy could lead to some circuits approving the waivers, setting a precedent in all states within that circuit -- and avoid an adverse ruling from the D.C. Circuit that has rejected some SSM exemptions in the past.

"This administration, if they had a decision in one circuit that would support their industry-friendly policy, they would apply that to the whole country," says one former Obama EPA official.

In a series of Tweets June 14, John Walke, clean air director for the Natural Resources Defense Council (NRDC) and also a former agency staffer, says the apparent strategy undermines an Obama-era rule that aimed to strip SSM exemption provisions from some states' air plans. He writes that EPA's issuance of state-specific SSM waiver approvals "is unraveling the safer national [Obama rule] & policy, EPA-region-by-region, state-by-state, in a blatant bid to avoid a national rulemaking that would be heard by the D.C. Circuit Court of Appeals."

D.C. Circuit litigation over the Obama EPA's 2015 SSM "SIP Call" rule, banning such exemptions in state implementation plans (SIPs) for attaining federal clean air standards, remains in abeyance pending the Trump EPA's decision on whether to scrap the Obama prohibition on state SSM waivers. The former agency officials are raising the concerns in response to two agency proposals that would allow emissions limit waivers for air pollution spikes during SSM in North Carolina and Texas. They fear that EPA will pursue such approvals instead of issuing a final SSM national rule subject to D.C. Circuit review.

Industry groups and states in the consolidated case, *Environmental Committee of the Florida Electric Power Coordinating Group, Inc., v. EPA, et al.*, sued EPA claiming the agency had overstepped its authority by disapproving the SIPs of some 36 states. Many states have scrapped the waivers, but some including Texas are fighting the effort.

Agency air chief Bill Wehrum has stated he does not believe that prior D.C. Circuit rulings preclude SSM exemptions, as the prior administration claimed they did. Rather, the Trump EPA is proceeding on the basis that existing D.C. Circuit rulings limit SSM waivers in federal rules, but not in SIPs. As a result, EPA has now proposed to approve SIPs for Texas and North Carolina containing various waivers. The former EPA officials say this amounts to a shift in national policy without a new national rule.

The first former EPA official says that in fact, the North Carolina proposal confirms a new national policy, and that the Trump EPA intends to impose wherever it can on a piecemeal basis. This is because there is no regional appeals court ruling compelling the approach taken in North Carolina. "I can't see how the argument in the North Carolina situation couldn't be true for any other state," the source says, adding that the theory that EPA is seeking to avoid review in the D.C. Circuit by approving state-specific waivers "totally makes sense to me."

### **SSM Policy**

An EPA spokesperson did not reply by press time to a request for updated information on the agency's intent to publish a national rule on SSM issues in SIPs.

However, EPA in a May 9 status report in the litigation says EPA continues to review its policy, that "this case should continue to be held in abeyance while EPA continues to review the SSM Action, and no action by the Court is required at this time."

The EPA status update does reference the two proposed state SIP approvals, however. On May 20, EPA Region 4, which covers Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee, released the proposed North Carolina waiver. EPA Region 6, which covers Arkansas, Louisiana, New Mexico, Oklahoma and Texas, proposed the waiver for Texas April 29. EPA is taking public comment on the Texas proposal through June 28, and the North Carolina proposal through August 6.

In a May 24 filing with the court, environmental groups including NRDC, Sierra Club and Environmental Integrity Project note that both the proposals in fact indicate EPA's intent to apply the new policy of allowing SSM exemptions to other states in EPA Regions 6 and 4. EPA's Texas proposal states, "If adopted, the alternative SSM policy regarding affirmative defense provisions being considered in this action would constitute guidance within Region 6 and the Region would apply it to states within this region."

The North Carolina proposal states, "In reviewing the North Carolina SIP revision at issue, as well as . . . other SIP revisions pending in the Region, Region 4 is considering the national policy regarding SSM exemptions in SIPs included in the [SIP Call] . . . and is evaluating whether there is a reasonable alternative way to consider SSM provisions in SIPs that allows such exemptions."

EPA regions under an Obama-era policy upheld by the courts can depart from national policies where doing so would be consistent for a state with the holdings of the relevant regional court of appeals. Hence a ruling from a regional circuit court that differs from the D.C. Circuit would allow a region to request permission to deviate from national policy for a state within the applicable regional circuit. In its Texas proposal, EPA relies on the 5th Circuit's 2013 ruling in *Luminant Generating Co. v. EPA*, which upheld the legality of "affirmative defenses" for malfunction situations. Affirmative defenses are legal defenses that allow polluters to avoid punishment for malfunctions deemed "unavoidable" by EPA, so long as they have met certain threshold requirements to maintain their equipment. EPA says that the *Luminant* ruling controls in the 5th Circuit, which covers Louisiana, Mississippi and Texas, and overrides the D.C. Circuit's 2014 ruling in *Natural Resources Defense Council (NRDC) v. EPA*, that found affirmative defenses incompatible with federal courts' authority to fashion penalties for air law violations.

The environmental groups in their May 24 legal filing say that "the states covered by these EPA regions lie in the U.S. Courts of Appeals for the 4th, 5th, 6th, 8th, 10th, and 11th Circuits. Thus, the course the agency appears to have begun exploring raises serious questions about whether the agency may, with centralized approbation, dismantle throughout the country a nationally applicable action on a purportedly piecemeal basis and thereby override Congress's" intent to centralize review of such nationally applicable issues in the D.C. Circuit.

